A

Kok Kon Sang v CIMB Bank Bhd

B HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-22NCC-112–09 OF 2021
CHOONG YEOW CHOY JC
24 APRIL 2024

C *Civil Procedure — Stay of proceedings — Application for — Stay of proceedings pending appeal against dismissal of application under O 14A of Rules of Court 2012 — Applicable tests — Special circumstances test — Balance of justice test — Expediency test — Whether stay of proceedings ought to be granted — Courts of Judicature Act 1964 ss 73 & 102 — Rules of Court 2012 O 14A — Rules of*
D *the Court of Appeal 1994 r 13 — Rules of the Federal Court 1995 r 52*

This was the plaintiff's application ('encl 123') for a stay of proceedings pending disposal of the plaintiff's appeal to the Court of Appeal against the decision of the High Court in dismissing the plaintiff's application for
E summary judgment under O 14A of the Rules of Court 2012. In opposing the application, the defendant argued that stay of proceedings ought not be granted on the mere fact that there was a pending appeal. The defendant's position was that a pending appeal did not amount to special circumstances. In support of its case, the defendant referred to the case of *RHB Bank Bhd v First*
F *Omni Sdn Bhd & Anor* [2021] MLJU 467 ('First Omni'). The defendant further argued that the dismissal of the plaintiff's O 14A application by the High Court was non-appealable, as such, no stay of proceedings ought to be granted. In this regard, the defendant relied on s 68(1)(e) of the Courts of Judicature Act 1964 ('Act 91').

G

Held, allowing the application for the stay of proceedings in encl 123 with costs in the cause:

(1) Pursuant to ss 73 and 102 of Act 91, r 13 of the Rules of the Court of
H Appeal 1994, and r 52 of the Rules of the Federal Court 1995, the High Court, the Court of Appeal and the Federal Court had powers to grant a stay pending the disposal of an appeal to the Court of Appeal or the Federal Court, as the case may be. The power to grant a stay of proceedings was also conferred on the courts through various provisions
I in the Rules of Court 2012. However, a court should be slow to grant an order for stay of proceedings because the initiation of a suit in a court of law demanded the suit be heard expeditiously and completed without any inhibition midway (see paras 21, 24 & 38).

(2) In *Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd*

[2005] 3 MLJ 132 ('Rowstead Systems'), after underscoring the point that the power of the court to grant a stay of proceedings was completely discretionary, the test proffered by the Court of Appeal was the special circumstances test. Be that as it may, the Court of Appeal regarded 'expediency' as an important consideration. The court in the present case found the reasonings advanced by the Court of Appeal in *Ling Peek Hoe & Anor v Golden Star & Ors* [2020] 6 MLJ 689 ('Ling Peek Hoe') and Rowstead Systems for the application of the 'balance of justice' and 'expediency' tests as both compelling and pragmatic and the court was bound to apply these considerations to the present application (see paras 40–41).

(3) The defendant had relied on *First Omni* in which the High Court had dismissed an application for stay of proceedings pending the appeal against the dismissal of an application made under O 14A of the Rules of Court 2012. However, the court in the present case was of the view that it was patent that the court was not bound by the decision of another High Court (see para 42).

(4) The court was of the considered view that if the stay of proceedings application in encl 123 was not granted and the court proceeded to hear the other interlocutory applications and the main action, it would result in a waste of time and effort by all parties involved if the Court of Appeal were to allow the plaintiff's appeal on his O 14A application. This was because the questions presented in the O 14A application had the effect of bringing the main action to an end. Hence, in applying the 'balance of justice' and 'expediency' tests as propounded by the Court of Appeal in *Ling Peek Hoe* and *Rowstead Systems* to the facts in the present application, the court allowed encl 123 (see paras 43–44).

(5) Given the uncertainty surrounding the interpretation and application of s 68(1)(e) of Act 91, until the appellate court provides clarity on this matter, the court believed it was reasonable to grant the order requested in encl 123 (see para 52).

[Bahasa Malaysia summary

Ini adalah permohonan plaintif ('lampiran 123') untuk penggantungan prosiding sementara menunggu penyelesaian rayuan plaintif kepada Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi yang menolak permohonan plaintif untuk penghakiman terus di bawah A 14A Kaedah-Kaedah Mahkamah 2012. Dalam membantah permohonan tersebut, defendan berhujah bahawa penggantungan prosiding tidak sepatutnya diberikan hanya atas fakta bahawa terdapat rayuan yang belum selesai. Pendirian defendan adalah bahawa rayuan yang belum selesai tidak terjumlah kepada keadaan khas. Bagi menyokong kesnya, defendan merujuk kepada kes *RHB Bank Bhd v First Omni Sdn Bhd & Anor* [2021] MLJU 467 ('First

A Omni'). Defendan selanjutnya berhujah bahawa penolakan permohonan A 14A plaintif oleh Mahkamah Tinggi tidak boleh dirayu, oleh itu, tiada penggantungan prosiding sepatutnya diberikan. Dalam hal ini, defendan bergantung pada s 68(1)(e) Akta Mahkamah Kehakiman 1964 ('Akta 91').

B **Diputuskan**, membenarkan permohonan penggantungan prosiding dalam lampiran 123 dengan kos dalam kausa:

(1) Menurut ss 73 dan 102 Akta 91, k 13 Kaedah-Kaedah Mahkamah Rayuan 1994, dan k 52 Kaedah-Kaedah Mahkamah Persekutuan 1995, Mahkamah Tinggi, Mahkamah Rayuan dan Mahkamah Persekutuan mempunyai kuasa untuk memberikan penggantungan sementara menunggu penyelesaian rayuan kepada Mahkamah Rayuan atau Mahkamah Persekutuan, mengikut mana-mana yang berkenaan. Kuasa untuk memberikan penggantungan prosiding juga diberikan kepada mahkamah melalui pelbagai peruntukan dalam Kaedah-Kaedah Mahkamah 2012. Walau bagaimanapun, mahkamah harus tidak terburu-buru untuk memberikan perintah penggantungan prosiding kerana permulaan saman di mahkamah undang-undang menuntut saman tersebut didengar dengan cepat dan diselesaikan tanpa apa-apa halangan di pertengahan jalan (lihat perenggan 21, 24 & 38).

(2) Dalam kes *Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd* [2005] 3 MLJ 132 ('Rowstead Systems'), selepas menekankan bahawa kuasa mahkamah untuk memberikan penggantungan prosiding adalah sepenuhnya mengikut budi bicara, ujian yang dikemukakan oleh Mahkamah Rayuan adalah ujian keadaan khas. Walau bagaimanapun, Mahkamah Rayuan menganggap 'expediency' sebagai pertimbangan penting. Mahkamah dalam kes semasa mendapati alasan yang dikemukakan oleh Mahkamah Rayuan dalam kes *Ling Peek Hoe & Anor v Golden Star & Ors* [2020] 6 MLJ 689 ('Ling Peek Hoe') dan Rowstead Systems untuk penggunaan ujian 'balance of justice' dan ujian 'expediency' sebagai meyakinkan dan pragmatik dan mahkamah terikat untuk menggunakan pertimbangan ini untuk permohonan semasa (lihat perenggan 40–41).

(3) Defendan telah bergantung pada kes First Omni di mana Mahkamah Tinggi telah menolak permohonan penggantungan prosiding sementara menunggu rayuan terhadap penolakan permohonan yang dibuat di bawah A 14A Kaedah-Kaedah Mahkamah 2012. Walau bagaimanapun, mahkamah dalam kes semasa berpendapat bahawa adalah jelas bahawa mahkamah tidak terikat dengan keputusan Mahkamah Tinggi yang lain (lihat perenggan 42).

(4) Mahkamah berpendapat bahawa jika permohonan penggantungan prosiding dalam lampiran 123 tidak diluluskan dan mahkamah meneruskan untuk mendengar permohonan interlokutori lain dan

tindakan utama, ia akan mengakibatkan pembaziran masa dan usaha oleh semua pihak yang terlibat jika Mahkamah Rayuan membenarkan rayuan plaintif ke atas permohonan A 14A beliau. Ini kerana soalan yang dikemukakan dalam permohonan A 14A tersebut mempunyai kesan menamatkan tindakan utama. Oleh itu, dalam mengunapakai ujian 'balance of justice' dan ujian 'expediency' seperti yang dikemukakan oleh Mahkamah Rayuan dalam *Ling Peek Hoe* dan *Rowstead Systems* kepada fakta dalam permohonan semasa, mahkamah membenarkan lampiran 123 (lihat perenggan 43–44).

(5) Mengambil kira ketidakpastian yang menyelubungi tafsiran dan pemakaian s 68(1)(e) Akta 91, sehingga mahkamah rayuan memberikan penjelasan mengenai perkara ini, mahkamah percaya bahawa perintah yang dimohon dalam lampiran 123 sewajarnya diluluskan (lihat perenggan 52).]

Cases referred to

Edelsten v Ward (No 2) (1988) 63 ALJR 346, HC (refd)
Ekar Lega Sdn Bhd v Central Spectrum (M) Sdn Bhd [2023] MLJU 2505; [2023] AMEJ 2280; [2023] CLJU 2292, HC (refd)
Ideal Principles Sdn Bhd v Central Spectrum (M) Sdn Bhd [2023] MLJU 2511; [2023] CLJU 2272; [2023] MLRHU 1827, HC (refd)
Institut Akauntan Malaysia v Kok Kon Sang [2024] 8 MLJ 101, HC (refd)
Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd [2013] 4 MLJ 213; [2013] 3 CLJ 47; [2013] 3 MLRA 104, CA (refd)
Jong Chuk v Chong Tung Sang & Ors (B) [1999] MLJU 163; [1999] 2 AMR 2381; [1999] 6 CLJ 574; [1999] 3 MLRH 389, HC (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257; [2003] 5 AMR 758; [2003] 4 CLJ 1, FC (refd)
L & M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd [2002] 3 SLR 312, HC (refd)
Ling Peek Hoe & Anor v Golden Star & Ors [2020] 6 MLJ 689; [2020] 9 CLJ 601; [2020] MLRAU 277, CA (folld)
MBF Capital Bhd & Anor v Tommy Thomas & Anor (No 8) [1998] 3 MLJ 232; [1998] 4 CLJ Supp 72; [1998] 1 MLRH 895, HC (refd)
PP v Dato' Sri Mohd Najib bin Hj Abd Razak [2019] 4 MLJ 421; [2019] 3 AMR 650; [2019] 6 CLJ 561; [2019] 4 MLRA 91, FC
R (on the application of AO & AM) v Secretary of State for the Home Department (stay of proceedings - principles) [2017] UKUT 168 (IAC) (refd)
RHB Bank Bhd v First Omni Sdn Bhd & Anor [2021] MLJU 467; [2021] AMEJ 0379; [2021] CLJU 381; [2021] MLRHU 291, HC (not folld)
Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd [2005] 3 MLJ 132; [2005] AMR 823; [2005] 2 CLJ 465; [2005] 1 MLRA 226, CA (folld)
Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp & Anor and other appeals [2009] 1 MLJ 502; [2009] 6 AMR 693; [2009] 1

CLJ 907; [2008] 3 MLRA 47, CA (refd)
Serangoon Garden Estate Ltd v Ang Keng [1953] MLJ 116; [1953] 1 MLRH 690 (refd)
Universal Trustee (M) Bhd v Lambang Pertama Sdn Bhd & Anor [2015] 7 MLJ 305; [2014] 5 AMR 57; [2014] 1 LNS 1437; [2014] MLRHU 458, HC (refd)

Legislation referred to

Arbitration Act 2005 s 10
Courts of Judicature Act 1964 ss 44, 44(1), 68(1)(e), 73, 102
Rules of Court 2012 O 14, O 14A, O 43, O 81, O 89
Rules of the Court of Appeal 1994 r 13
Rules of the Federal Court 1995 r 52

Self represented for the plaintiff.
Lee Tzi Jiun (Zairina Loh & Wong) for the defendant.

Choong Yeow Choy JC:

INTRODUCTION

[1] The plaintiff, Kok Kon Sang, initiated a writ action against the defendant, CIMB Bank Bhd, in September of 2021. To date, 160 cause papers have been filed. While the defendant had filed two interlocutory applications, namely, notices of application for summary judgment on its counterclaim (in encl 21) and for striking out the plaintiff's writ and statement of claim (in encl 12), the plaintiff has made eleven interlocutory applications. A number of these applications have been resolved while the remainder are still pending disposal. The plaintiff has also written 45 letters to this court, based on the CMS record, and numerous letters to various entities such as the Bar Council, the PDRM, Bank Negara Malaysia and the Chief Justice (the plaintiff informed this court that he has sent six letters to the Chief Justice, that is, on 23 February 2023; 17 March 2023; 26 June 2023; 26 September 2023; 15 July 2023; and 15 November 2023 seeking an explanation as to why his name has been 'blacklisted').

[2] It has also come to this court's attention that the plaintiff has been declared a vexatious litigant by the High Court at Kuala Lumpur in *Institut Akauntan Malaysia v Kok Kon Sang* [2024] 8 MLJ 101 ('KL Suit 1904'). The plaintiff in that KL Suit 1904 had made the application to declare Kok Kon Sang as a vexatious litigant 'based on twelve different proceedings and nineteen interlocutory applications by the defendant against the plaintiff'. In that suit, he had also filed several interlocutory applications.

[3] While access to justice and the courts is a fundamental right, excesses is altogether another matter. In order that the integrity and effectiveness of the legal system are maintained and to ensure that it remains a tool for justice rather than an instrument of harassment or abuse, such a right may be curtailed.

[4] Despite the immoderations on the part of the plaintiff in the conduct of this present suit as demonstrated in the opening paragraph, the immediate concern of this court relates specifically to an application that has been filed by the plaintiff in encl 123. That application is for a stay of proceedings pending disposal of an appeal by the Court of Appeal against a decision of this court (Muniandy J) in dismissing the plaintiff's application for summary judgment under O 14A of the Rules of Court 2012.

[5] It should also be noted that the plaintiff has at the same time applied for other pending matters to be set down for trial. Regardless of the incongruity in the manner in which the plaintiff is prosecuting his claim, the application in encl 123 raises a very imperative point relating to one important aspect of procedural law, that is, the principles governing the granting of an order for stay of proceedings.

THE OVERRIDING ISSUE

[6] In considering the application in encl 123, the vital issue is whether the plaintiff is entitled to the relief sought in the said notice of application.

[7] In determining the above issue, due emphasis will be paid to the principles governing the stay of proceedings in the civil litigation process.

THE DEFENDANT'S CONTENTIONS

[8] The defendant advanced the argument that stay of proceedings ought not be granted on the mere fact that there is a pending appeal. Its position is that a pending appeal does not amount to special circumstances. In other words, special circumstances must be demonstrated.

[9] In support of its above contention, the defendant cited the decision of the Federal Court in *Public Prosecutor v Dato' Sri Mohd Najib bin Hj Abd Razak* [2019] 4 MLJ 421; [2019] 3 AMR 650; [2019] 6 CLJ 561; [2019] 4 MLRA 91.

[10] The defendant also referred to *RHB Bank Bhd v First Omni Sdn Bhd & Anor* [2021] MLJU 467; [2021] AMEJ 0379; [2021] CLJU 381; [2021] MLRHU 291 ('First Omni') in which the High Court had dismissed an application for stay of proceedings pending the appeal against the dismissal of

an application made under O 14A of the Rules of Court 2012, a situation identical to this instant matter.

[11] In *First Omni*, the High Court referred to *Public Prosecutor v Dato Sri Mohd Najib bin Hj Abdul Razak* and opined that:

> [19] The principles that stay of criminal proceedings pending or to await the outcome of appeal on decision in interlocutory application which interrupted or fragmented the criminal trial process should not be granted applies equally to civil trial process.

[12] *First Omni* also referred to another High Court decision, that is, *Universal Trustee (M) Bhd v Lambang Pertama Sdn Bhd & Anor* [2015] 7 MLJ 305; [2014] 5 AMR 57; [2014] 1 LNS 1437; [2014] MLRHU 458 ('Universal Trustee'), where Wong Kian Kheong JC (as His Lordship then was) held that:

> [21] Case law does not distinguish stay of execution from stay of proceedings. Case law requires both the applicants for stay of execution and stay of proceedings to show 'special circumstances' to justify a stay.

His Lordship in the next paragraph also expressed the view that:

> [22] ... an applicant for a stay of proceedings should bear a heavier burden vis a vis an applicant for a stay of execution. This is because an application to stay proceedings will hinder an expeditious disposal of a suit ...

[13] In support of the above view, the learned judicial commissioner in *Universal Trustee* made reference to the Court of Appeal decision in *Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd* [2013] 4 MLJ 213 at p 222; [2013] 3 CLJ 47 at p 58; [2013] 3 MLRA 104 and the Singapore High Court in *L & M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd* [2002] 3 SLR 312 at para 17.

[14] In respect of the possibility that the plaintiff in the present matter would have been put to unnecessary costs and expenses of a trial or proceedings if his O 14A appeal were allowed, the defendant alluded to the fact that such a likelihood scenario had been considered by the High Court in *First Omni*. The relevant parts of the judgment read as follows:

> [27] If the second defendant really desired an early hearing for its appeal by the Court of Appeal on the matters before the trial of the suit, working diligently, it is not impossible to procure a hearing of the appeal before the month of August 2021.
>
> [28] If the second defendant was to succeed in its appeal, then the plaintiff's claim in this suit would be dismissed and any such trial dates as allocated and fixed may be reallocated to other cases. The only prejudice to the second defendant would be the costs and expenses in getting ready for the trial before the decision of the Court of

Appeal if in favour of the second defendant. Such prejudice to the second defendant could be compensated by an order on the costs.

[29] The fact that the second defendant would be put to the costs and expenses of a trial or proceedings before the trial was irrelevant and would not qualify as 'exceptional circumstances' or 'special circumstances. See: *Public Prosecutor v Dato' Sri Mohd Najib bin Hi Abd Razak* [2019] 4 MLJ 421 (FC) at para 32(g).

[30] If the second defendant was not successful in its appeal, the suit herein could proceed to trial on the allocated and available dates as scheduled instead of only allocating and fixing suitable trial dates available and giving necessary directions for trial only after the outcome of the second defendant's appeal. This course would minimised any further delay in the proceedings for the trial.

[31] Even if the trial of the suit was completed with final decision of the court before the second defendant's appeal was dealt with by the court, it would not prejudice the second defendant as the second defendant could still appeal against such decision if against him and for it to be dealt with by the court together with the present pending appeal.

[32] In the premises, it cannot be said that if the stay of the proceedings in the suit herein as sought by the second defendant was not granted, the second defendant's pending appeal would be rendered futile or nugatory or academic.

[15] The defendant further alluded to other examples where the courts have dismissed applications for stay of proceedings pending appeal against decisions made in interlocutory matters and the cases include:

(a) *Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp & Anor and other appeals* [2009] 1 MLJ 502; [2009] 6 AMR 693; [2009] 1 CLJ 907; [2008] 3 MLRA 47 — where the Court of Appeal dismissed the defendants' motion for stay pending the appeal against the dismissal of their application to strike out the plaintiffs' suit for want of prosecution;

(b) *Universal Trustee (M) Bhd v Lambang Pertama Sdn Bhd & Anor* [2015] 7 MLJ 305; [2014] 5 AMR 57; [2014] 1 LNS 1437; [2014] MLRHU 458 — where the High Court dismissed the defendants' application to stay the hearing of the plaintiff's application for striking out pending their appeal against the summary judgment granted in favour of the plaintiff;

(c) *Jong Chuk v Chong Tung Sang & Ors (B)* [1999] MLJU 163; [1999] 2 AMR 2381; [1999] 6 CLJ 574; [1999] 3 MLRH 389 — where the High Court dismissed an application by the sixth defendant/third party therein for stay of proceedings pending final disposal of three appeals to the Court of Appeal on grounds that a final decision on the merits of the civil case had not been made and there was no pending execution of a final order at the instant date and that the allegation that continuing the proceedings would render its case nugatory was irrelevant and speculative; and

A (d) *MBF Capital Bhd & Anor v Tommy Thomas & Anor (No 8)* [1998] 3 MLJ 232; [1998] 4 CLJ Supp 72; [1998] 1 MLRH 895 — where the High Court dismissed an application for stay of proceedings pending the appeal against an interlocutory order.

B **[16]** The defendant also reiterated that the Court of Appeal has held in *Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd* [2013] 4 MLJ 213 that the initiation of a suit in a court of law demands the suit be heard expeditiously and completed without any inhibition midway and that any application for stay which is intended to suspend proceedings ought to be rejected.

C

[17] The plaintiff is a litigant in person. His main contention is that there are special circumstances for stay before this court until his appeal against the dismissal of his O 14A application has been disposed of by the Court of Appeal.

D

[18] The only authorities cited by the plaintiff are *Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116; [1953] 1 MLRH 690 and *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 5 AMR 758; [2003] 4 CLJ 1.

E

PRINCIPLES GOVERNING STAY OF PROCEEDINGS

[19] It must be remembered that an application for stay of proceedings may arise out of a myriad of circumstances. One such situation is when a party F commences a civil action despite the existence of an arbitration agreement or clause. In such a case, if the other party that has been sued wishes to invoke and rely on the arbitration agreement or clause, the said defendant may apply to the court for a stay of proceedings pursuant to s 10 of the Arbitration Act 2005. Many commentators have argued that a stay must be granted when s 10 is G invoked. To interpret s 10 of the Arbitration Act 2005 as a mandatory provision without any disqualification whatsoever is, in this court's view, incorrect. The courts retain the discretion to refuse an application for a stay if it could be demonstrated that one of the limited exceptions for refusal to grant a stay of proceedings applies in that said case.

H

[20] In a situation such as the present case, unlike the position under s 10 of the Arbitration Act 2005, when an application for an order for stay of proceedings is made, the approach to be adopted by the court is the converse.

I **[21]** As exemplified in the cases cited above by the defendant, the principle is that a court should be slow to grant an order for stay of proceedings. The rationale in support of such an approach is obvious. The Court of Appeal in *Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd* [2013] 4 MLJ 213 clarified that the initiation of a suit in a court of law demands the suit be heard

expeditiously and completed without any inhibition midway. The Singapore High Court in *L & M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd* explicated the justification in the following terms:

> The litigation process would become most unsatisfactory if all such interlocutory applications must first receive the attention of the highest court in our system of justice before the next step could be taken.

[22] To the above, this court would add the case of *R (on the application of AO & AM) v Secretary of State for the Home Department (stay of proceedings — principles)* [2017] UKUT 168 (IAC) which reasoned that every claimant is entitled to expect expeditious judicial adjudication.

[23] This is not to say that a stay of proceedings cannot be granted. In *R (on the application of AO & AM) v Secretary of State for the Home Department*, the court added that the strength of every claimant's expectation will have to be calibrated according to the individual litigation equation. It further held that:

(a) any judicially imposed delay flowing from a stay order requires good reason;

(b) judicial choreography whereby one case is frozen awaiting the outcome of another is justified for example where the assessment is that the latter will have a critical impact upon the former; and

(c) great caution is to be exercised where a stay application is founded on the contention that the outcome of another case will significantly influence the outcome of the instant case. In other words, the courts retain the discretion to grant an order for a stay of proceedings.

[24] As noted by the Court of Appeal in *Ling Peek Hoe & Anor v Golden Star & Ors* [2020] 6 MLJ 689; [2020] 9 CLJ 601; [2020] MLRAU 277 ('Ling Peek Hoe'), a case that has not been cited by either party, ss 73 and 102 of the Courts of Judicature Act 1964 and r 13 of the Rules of the Court of Appeal 1994 ; r 52 of the Rules of the Federal Court 1995, the High Court, Court of Appeal and the Federal Court have powers to grant a stay pending the disposal of an appeal to the Court of Appeal or the Federal Court, as the case may be. It should also be added that the power to grant a stay of proceedings is also conferred on the courts through various provisions in the Rules of Court 2012.

[25] Returning to the central issue in this matter, the defendant's reliance on *First Omni* in which the High Court had dismissed an application for stay of proceedings pending the appeal against the dismissal of an application made under O 14A of the Rules of Court 2012 warrants serious consideration.

[26] The High Court in *First Omni* made a compelling reasoning for a

refusal to grant a stay. Since the situation in *First Omni* is identical to this instant matter, this court ought to give due weightage to *First Omni* and deny the order as sought by the plaintiff in the present application. However, it is patent that this court is not bound by the decision of another High Court.

[27] Another decision that neither party has cited is *Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd* [2005] 3 MLJ 132; [2005] AMR 823; [2005] 2 CLJ 465; [2005] 1 MLRA 226 ('Rowstead Systems'). Although the circumstances leading to the application for an order for a stay of proceedings in *Rowstead Systems* differs from that in the present application, the 'expedience test' as enunciated by the Court of Appeal is both practical and sensible.

[28] In *Rowstead Systems*, the defendant had applied for the judicial commissioner to recuse himself from hearing the case that was before him. The judicial commissioner ruled that there were no merits in the application and made the decision not to recuse himself. Dissatisfied, the defendant lodged an appeal against that decision and sought an order for a stay or proceedings of the said matter pending the decision on the appeal by the Court of Appeal.

[29] A point was raised pertaining to the fact that the defendant/appellant had not applied for stay of proceedings at the High Court. The defendant/appellant only made the stay application at the Court of Appeal and thus an issue raised was whether such an application for stay of proceedings could be entertained by the Court of Appeal. The Court of Appeal held that by virtue of s 44(1) of the Courts of Judicature Act 1964, it had the authority to entertain such application.

[30] Section 44 of the Courts of Judicature Act 1964 states as follows:

> 44(1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of the parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.
>
> (2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.
>
> (3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed varied or discharged by the Court.

[31] The Court of Appeal explained its ruling on the point in the following terms:

> Based on the clear wording of s 44(1) of the said Act we were fully satisfied that this court have the authority to entertain such application. An appeal against the decision of the learned JC is pending in this court. This is an interim application pending the hearing of the appeal. We therefore proceeded to hear the application before us which was whether the application for stay of the proceedings be granted or otherwise. It is however a well established principle of law that the power of the court to grant a stay is completely discretionary.

[32] It is granted that this 'jurisdiction point' is not an issue in our present case as the application is made to this court. As explained in para [24] above, this court is vested with the jurisdiction to hear the application. However, as noted by the Court of Appeal in *Rowstead Systems*, it is a well-established principle of law that the power of the court to grant a stay is completely discretionary and the vital question is what are the applicable or guiding principles when a court is required to exercise such a discretion.

STAY OF PROCEEDINGS AND STAY OF EXECUTION: DIFFERENT CONSIDERATIONS?

[33] The principles relating to the granting of an order for a stay of execution can be regarded as settled law. Reference can be made to the often-cited Federal Court decision in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 5 AMR 758; [2003] 4 CLJ 1 ('Kosma Palm Oil').

[34] In order to succeed in an application for stay of execution, the party seeking the order must convince the court on the existence of special circumstances. It is trite that what would constitute as special circumstances cannot be defined with precision and the decided cases are merely illustrations of what the courts have considered as amounting to special circumstances or otherwise. An appeal being rendered nugatory is a stay of execution is not granted is merely one such example. What would constitute as special circumstances is ultimately a question of fact.

[35] The crucial question is whether the special circumstances test apply to stay of proceedings applications. The defendant in this case argued that the answer is in the affirmative. To this, the defendant relied on *Universal Trustee*, where the High Court had opined that 'case law does not distinguish stay of execution from stay of proceedings' and that 'case law requires both the applicants for stay of execution and stay of proceedings to show 'special circumstances' to justify a stay'. In fact, the High Court in *Universal Trustee* went on to express the view that an applicant for a stay of proceedings bears a heavier burden vis a vis an applicant for a stay of execution (see para [12]).

[36] However, it may also be suggested that the test for a stay of proceedings differ from the test for a stay of execution, in that the former is not subject to the same stringent test of special circumstances. Proponents of this view will draw support for such a proposition from the decision of the Court of Appeal in *Ling Peek Hoe*.

[37] In *Ling Peek Hoe*, the defendants had attempted to persuade the Court of Appeal to apply the special circumstances test to support their application for stay of the (committal) proceedings in the High Court by relying on special circumstances test as enunciated by the Federal Court in *Kosma Palm Oil*. The Court of Appeal rightly pointed out that *Kosma Palm Oil* 'does not concern an application to stay proceedings'.

[38] Regardless of whichever test is applicable in a stay of proceedings application, if a stay of proceedings application is made pursuant to a matter pending appeal, as in the present case, the court should be slow to allow such an application. As a stay of proceedings order has the effect of hindering an expeditious disposal of a suit, good reason (*R (on the application of AO & AM) v Secretary of State for the Home Department*) or exceptional circumstances (*Edelsten v Ward (No 2)* (1988) 63 ALJR 346) must be shown before the court exercises its powers to grant an order for a stay of proceedings.

[39] In *Ling Peek Hoe*, the Court of Appeal alluded to what may be termed as the 'balance of justice' test. The Court of Appeal explained as follows:

> [50] ... we regard the jurisdiction involved by the High Court as exceptional, that is to say, it is a jurisdiction which should not be exercised unless it appears that the order appeal from it will affect an injustice and the injustice can be avoided by the intervention of the court.
>
> ...
>
> [53] It is undeniable that if the respondents were ultimately to succeed on the review application, the severity of prejudice that could be suffered by the defendants is apparent if the stay of committal proceeding is not allowed as the committal proceeding is a proceeding that is penal in nature. The issue on the balance of justice is therefore in favour of the defendants.

[40] In *Rowstead Systems*, after underscoring the point that the power of the court to grant a stay of proceedings is completely discretionary, the test proffered by the Court of Appeal is the special circumstances test. Be that as it may, the Court of Appeal regarded 'expediency' as an important consideration. This was explained as follows:

> We have also taken into consideration the fact that in the event that a stay a proceedings was not granted and the learned JC be allowed to proceed with the hearing of this case, it would result in a waste of time and effort by all persons involved since if the Court of Appeal allows the appeal the whole proceedings

conducted by the learned JC would have to be completely expunged. In the circumstances it would be more expedient to allow a stay of the proceedings until the hearing of the appeal has been completed.

[41] This court finds the reasonings advanced by the Court of Appeal in *Ling Peek Hoe* and *Rowstead Systems* for the application of the 'balance of justice' and 'expediency' tests as both compelling and pragmatic and is bound to apply these considerations to the present application.

[42] Indeed, the defendant had relied on *First Omni* in which the High Court had dismissed an application for stay of proceedings pending the appeal against the dismissal of an application made under O 14A of the Rules of Court 2012. However, as noted in para [26], it is patent that this court is not bound by the decision of another High Court.

[43] This court is of the considered view that if the stay of proceedings application in encl 123 is not granted and this court proceeds to hear the other interlocutory applications and the main action, it would result in a waste of time and effort by all parties involved if the Court of Appeal were to allow the plaintiff's appeal on his O 14A application. This is because the questions presented in the O 14A application have the effect of bringing the main action to an end.

[44] Hence, in applying the 'balance of justice' and 'expediency' tests as propounded by the Court of Appeal in *Ling Peek Hoe* and *Rowstead Systems* to the facts in the present application, this court allows the application for the stay of proceedings in encl 123.

[45] The order for costs shall be costs in the cause.

IS THE DISMISSAL OF AN APPLICATION PURSUANT TO O 14A APPEALABLE?

[46] In resisting the plaintiff's application in encl 123, the defendant had also argued that the dismissal of the plaintiff's O 14A application by Muniandy J is non-appealable. Hence, no stay of proceedings ought to be granted.

[47] The defendant made reference to s 68(1)(e) of the Courts of Judicature Act 1964 which provides that no appeal shall be brought to the Court of Appeal where a High Court dismissed any application for summary judgment.

[48] The defendant also referred to remarks that I had made by way of postscript in *Ideal Principles Sdn Bhd v Central Spectrum (M) Sdn Bhd* [2023]

MLJU 2511; [2023] CLJU 2272; [2023] MLRHU 1827 ('Ideal Principles') (see also *Ekar Lega Sdn Bhd v Central Spectrum (M) Sdn Bhd* [2023] MLJU 2505; [2023] AMEJ 2280; [2023] CLJU 2292 ('Ekar Lega')) whereby I expressed the view that the prohibition in s 68(1)(e) of the Court of Judicature Act 1964 applies to *all* summary judgment proceedings (namely, O 14, O 14A, O 43, O 81 and O 89 of the Rules of Court 2012) and not limited to a summary judgment application pursuant to O 14 of the Rules of Court 2012.

[49] Since the dismissal of the plaintiff's notice of application for summary judgment under O 14A does not result in the dismissal of the plaintiff's main action, I stand by the remarks that I had made in *Ideal Principles* and *Ekar Lega* that the decision to dismiss his summary judgment is non-appealable.

[50] It is my understanding that there are currently differing opinions as to whether the provision in s 68(1)(e) of the Courts of Judicature Act 1964 applies to only O14 proceedings or include *all* summary judgment proceedings, including O 14A.

[51] While my decisions in *Ideal Principles* and *Ekar Lega* are currently under appeal before the Court of Appeal, I had previously noted that we would await the Court of Appeal's decision regarding the interpretation of s 68(1)(e) of the Courts of Judicature Act 1964.

[52] Given the uncertainty surrounding the interpretation and application of s 68(1)(e) of the Courts of Judicature Act 1964, until the appellate court provides clarity on this matter, this court believes it is reasonable to grant the order requested in encl 123.

Application for stay of proceedings in encl 123 allowed with costs in the cause.

Reported by Dzulqarnain Ab Fatar